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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 370 (CM)

5 MATTHEW CONNOLLY
6 and GAVIN CAMPBELL BLACK,

7 Defendants.

8 New York, N.Y.
9 December 14, 2017
10:45 a.m.

10 Before:

11 HON. COLLEEN MCMAHON

District Judge

12 APPEARANCES

13 JOON H. KIM
14 Acting United States Attorney for the
Southern District of New York

15 BY: ALISON ANDERSON
16 RICHARD POWERS
MICHAEL KOENIG
CAROL SIPPERLY (via telephone)
17 and
D. BRITTAIN SHAW
18 CHRISTOPHER JACKSON
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19 Assistant United States Attorneys

20 PAUL HASTINGS LLP
Attorneys for Defendant Matthew Connolly
21 BY: KENNETH BREEN
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23 Attorneys for Defendant Gavin Campbell Black
BY: SETH LEVINE
24 SCOTT KLUGMAN
MIRIAM ALINIKOFF
25 AARON KARP

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(Case called)

(In open court)

MS. ANDERSON: Alison Anderson, Richard Powers and Michael Koenig for the government. Appearing by phone is Carol Sipperly.

MR. BREEN: Ken Breen, John Nowak and Phara Guberman for Matthew Connolly who is present here in court.

MR. LEVINE: Seth Levine, Miriam Alinikoff and Scott Klugman for Mr. Black, who is also here in the courtroom today.

THE COURT: OK. I didn't mean to drag the trial team all the way up here to talk about scheduling other matters. This is not gone the way I wanted it to, and I appreciate that the government made extensive efforts to get Mr. Prange, and I don't know, we may need Mr. Meaney any now, to be over here, and I am very appreciative of that. I am very appreciative of that, but I had set aside time to do a full and complete hearing over the course of these two days in December, knowing that I had another trial to do between now and our current trial date.

I certainly got a sense yesterday of what Mr. Levine has in mind. Mr. Levine, I think you should give me your exhibits so I can become familiar with them.

MR. LEVINE: We have them for you.

THE COURT: And I spent a lot of time last night, when I finally had time to think, thinking about his presentation.

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1 And, Mr. Levine, it's all very interesting, and I think most of
2 it is besides the point.

3 You know, the government has a difficult burden here
4 because it's hard to prove a negative, but the government's
5 burden is to demonstrate that people were not exposed directly
6 or indirectly to your client's testimony, or that, if they
7 were, they had alternative ways of finding out exactly the same
8 thing.

9 It seems to me that the government -- is Mr. Weeks the
10 only person who testified in front of the grand jury that would
11 turn the indictment of Mr. Black?

12 MS. ANDERSON: Yes, your Honor.

13 THE COURT: He is?

14 MS. ANDERSON: And to the extent if we are getting
15 into these issues, we would like to bring up the Kastigar team.

16 THE COURT: I'm just asking you the question. You're
17 the trial team. You presented to the grand jury, right?

18 MS. ANDERSON: We did.

19 THE COURT: So presumably you are the people who can
20 answer that question.

21 MS. ANDERSON: There is one witness and that was
22 special agent Weeks.

23 THE COURT: One witness, and that was special agent
24 Weeks.

25 So, far be it from me to tie Mr. Levine's hands -- I

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1 mean he has a client to protect, he has to do what he has to do
2 to protect his client -- but what I don't want to do is end up
3 turning this into a complete frolicking detour.

4 And while I must say, now that you all are here -- and
5 Ms. Sipperly is on the phone -- I'm not thrilled with the way
6 I've been treated by the trial team. I'm not thrilled at being
7 given information that later has to be taken back by the
8 government, or isn't taken back by the government but turns out
9 to be demonstrably false --

10 MS. ANDERSON: And, your Honor, we do think while
11 there were sort of cherry picked examples taken out of context,
12 we would like the opportunity obviously to respond to things
13 that were raised yesterday in regard to the prosecution team
14 briefing, and can deal with that separately and as a separate
15 issue. We do think --

16 THE COURT: It is a separate issue.

17 MS. ANDERSON: And we plan to address it, obviously.

18 THE COURT: Good.

19 So, let's talk about -- taint team, where are you?
20 You're back there somewhere. Good morning. Come on up here.

21 MS. SHAW: Brittain Shaw on behalf of the United
22 States, accompanied by Christopher Jackson and Jesse
23 Alexander-Hoepfner, also trial attorneys for the United States.

24 THE COURT: OK. So, I want to say that correcting
25 mistakes is not what I consider to be rebuttal testimony, that

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1 Mr. Levine is dealing with the record as it is. You have put
2 in your affidavits. OK? We have an issue to be taken up with
3 the taint team dealing with paragraph 9 of Mr. Meaney's
4 affidavit -- or declaration. Right? We have to do that. We
5 have to make sure that the declarations -- and this is a taint
6 team job -- the declarations that were filed under seal that
7 contain no grand jury material are promptly filed not under
8 seal.

9 We have Mr. Prange to deal with, and we have a date
10 for Mr. Prange. And we have been alerted -- not that I needed
11 to be alerted -- that it's not going to be a 15 minute process.
12 Nothing with Mr. Levine is a 15 minute process. Don't hang
13 your head; you're doing your job.

14 So, what else are we going to have to do? Mr. Levine,
15 you have a book of exhibits presumably from which you intend to
16 argue, but presumably that you want to introduce into evidence.

17 MR. LEVINE: Your Honor, for today what our plan
18 was -- we have made sure that the taint team has seen all the
19 things we put up on the screen or refer to and ask them to
20 check them to make sure there was no issues.

21 THE COURT: Good. I was going to suggest that it
22 would be helpful to me if I could spend my Christmas vacation
23 familiarizing myself with these materials.

24 MR. LEVINE: Well, we're going to provide that to you
25 today. With respect to additional exhibits and what else we're

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1 going to present, we're obviously going to consider that. We
2 obviously have some additional discovery-related issues here
3 that affects what we're going to put in.

4 I know that the taint team -- and I promised the taint
5 team I won't say anything about things that have not been
6 disclosed publicly or -- what I'm saying is we have an issue to
7 talk about today about what we do before our next appearance to
8 make sure that we have the materials that we need, and also
9 that for the materials that have been -- including some of the
10 materials I'm going to give you, your Honor --

11 THE COURT: OK, that's an issue that doesn't involve
12 the trial team.

13 MR. LEVINE: Yes, ma'am.

14 THE COURT: All right. So the trial team is here, and
15 Ms. Sipperly is on the phone, and presumably they have work to
16 do. So the real issue for us, the trial team in the broadest
17 sense, is to figure out when we're going to try this case. I
18 would still like to try it at the end of February. I've got
19 everybody. Mr. Breen is about to jump up.

20 MR. BREEN: We won't have the five week window that
21 you want if we tried it in the end of February. We start a
22 trial in Wilmington, picking a jury on March 5, starting with
23 opening statements on March 12.

24 THE COURT: March 5? That was not the date you gave
25 me.

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1 MR. BREEN: I gave you the March 12 date; that's when
2 opening statements are starting. It's lasting six weeks, so it
3 does not give us the five week window that you asked for.

4 THE COURT: It doesn't even give us a two week window.

5 MR. BREEN: I've always thought the trial was going to
6 be shorter than that.

7 THE COURT: I would hope the trial was going to be
8 shorter than that. I would hope the trial was going to be
9 shorter, but I can't guarantee two weeks. I don't think the
10 government can guarantee two weeks. The government trial team
11 is shaking its head.

12 I don't know why I always have to take second place to
13 judges in other districts.

14 MR. BREEN: I did my best to move it. There is at
15 least 50 defense lawyers.

16 THE COURT: I know you said there are 50 defense
17 lawyers.

18 OK. Well, that's going to make life easy. It's going
19 to make life easy. Do we have a month, a window when
20 everybody -- I'm thinking.

21 MR. BREEN: June 18.

22 THE COURT: -- a two to three week case, and possibly
23 a week of deliberations, and a hurricane will happen in the
24 middle of it. All right? I mean that's what I'm trying to
25 account for.

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1 MS. ANDERSON: Your Honor, the government is ready to
2 go whenever, and obviously we think the sooner the better, but
3 other than that we're available.

4 MR. BREEN: June 18, your Honor, is when you're back,
5 and that's what I would ask for.

6 THE COURT: Mr. Levine?

7 MR. LEVINE: If that's convenient for all the parties,
8 your Honor, that's fine with us. Thank you, your Honor.

9 OK, that's it, show time, June 18.

10 Now, here is what that means: I will honor the date
11 that Mr. Prange has given us, but what I would prefer is for us
12 to do the Kastigar hearing on the day that we were going to
13 pick a jury in this case, and the subsequent day, and that we
14 do the whole thing. And hopefully our British friend and
15 possibly our British friends -- because I really think maybe I
16 need to hear from Mr. Meaney -- could accommodate us on that
17 date or week. It just makes more sense than trying to do this
18 piecemeal.

19 If I can't get Mr. Prange any other way, then I will
20 stop the other trial, and I will do him if I have to, but that
21 would not be my preference. My preference is at the end of
22 February -- and we could even start in the week before. We
23 could start on the 21st of February. We can start that early,
24 and that we do it, and that we do it from day to day until
25 concluded.

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1 MS. ANDERSON: And, your, Honor, just for scheduling
2 purposes, we would ask both that time is excluded and, if we're
3 going to have new filing, scheduling a date.

4 THE COURT: Well, I'm going to have to redo the whole
5 schedule, but I assume that this is on consent, gentlemen.

6 MR. BREEN: Yes, your Honor.

7 MR. LEVINE: Of course, your Honor.

8 THE COURT: So time is excluded until June 18.

9 Now I'll do it, I will figure out the revised schedule
10 and get it out.

11 I would appreciate it if the government could check
12 with our friends across The Pond, check with our friends across
13 The Pond and see if in the goodness of their hearts they could
14 come toward the end of February rather than in the middle of
15 January.

16 MS. SHAW: We're happy to do so, your Honor. And I do
17 have some understanding of Mr. Prange's schedule. There may be
18 some conflict on those particular days, but if as your Honor
19 indicated there is leeway before or after, we will do our best
20 to get him here.

21 THE COURT: Well, there is no leeway in the week
22 before. But let's assume that we will be available for a
23 hearing from February 21 through March 2 -- and Mr. Breen can
24 then go to Delaware -- if we can get Mr. Prange and anybody
25 else we need to get during that period, it's just going to be

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1 easier. OK?

2 MS. SHAW: We will do our best, your Honor. Thank
3 you.

4 THE COURT: Sorry for the delay. And until the last
5 meeting that we all had, I was unaware of Mr. Breen's schedule
6 that is even worse than I thought. OK?

7 Do I need the trial team for anything else?

8 MS. ANDERSON: Not that we are aware of, no, nothing
9 from us.

10 MR. LEVINE: Can I just ask with respect to the new
11 schedule that you're going to put in place. Obviously the
12 schedule that was put in place previously was based on a very
13 compressed time window. If we could, consistent with the --

14 THE COURT: Will I be more civilized; is that what
15 you're asking?

16 MR. LEVINE: I'm certainly not asking that question.
17 I would like to have a schedule that has a little more room --

18 THE COURT: I will do what I think is a meaningful
19 adjustment to the schedule, Mr. Levine.

20 MR. LEVINE: On the 3500 date, given the complexity of
21 the case, and to the extent there is additional 3500 and
22 Jencks, getting that earlier so we can do additional
23 investigation would be something we would be grateful for.
24 Thank you, your Honor.

25 THE COURT: OK. Anything else with the trial team?

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1 MS. SIPPERLY: No. Before we excuse, we just want to
2 restate that the trial team in no way ever intended to say
3 anything that is contradictory, and we fully expect to explain
4 to the court what we said in the papers compared to what
5 e-mails have been shown. And to the extent we want that
6 opportunity, we would want that opportunity sooner rather than
7 later to explain that.

8 THE COURT: I rather expect that you will send me
9 something.

10 MS. SIPPERLY: Thank you.

11 THE COURT: OK. Oh, and I have your other brief that
12 you filed, which I'm still expecting a response to, but...

13 MR. LEVINE: Excuse me, your Honor. When we were here
14 last time you instructed us that you were going to review it
15 and tell us what our response date was, and so you said you
16 wanted to look at it first. He we did not put it in because
17 you specifically told us that's not how your wanted to proceed.

18 MS. ANDERSON: And that's consistent with our memory
19 as well.

20 THE COURT: I'm sorry. I forgot that, and I can't
21 claim to have any memory. I told you I have triage brain.

22 MR. LEVINE: You know, certainly if the court would
23 like a response --

24 THE COURT: Early January.

25 MR. LEVINE: Thank you, your Honor.

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1 MR. BREEN: Thank you.

2 THE COURT: Merry Christmas.

3 MR. LEVINE: Your Honor, I would just like to make one
4 point. If Ms. Sipperly wishes to put in a supplemental brief,
5 that's fine, obviously. But I do note, your Honor, that in my
6 view the trial team here are witnesses. If they want to make
7 additional statements here, that is supplementing the record
8 that has been closed by the government. So, I'm not quite sure
9 why it is there is a supplemental brief that's appropriate.
10 They had their opportunity to put in their evidence. I'm
11 trying, if you will, to deal with the taint team, and that
12 record is closed.

13 THE COURT: I think what the trial team is proposing
14 to do is something in the manner of an apology.

15 MS. SIPPERLY: Correct.

16 MS. ANDERSON: And a clarification. And I think we're
17 dealing with sort of separate issues. We're not trying to
18 supplement any Kastigar issues.

19 THE COURT: Mr. Levine's position -- which he made
20 very clear yesterday when you weren't here -- is that
21 everybody's credibility from the government is suspect because
22 things were told to me that turned out not to be true, and that
23 I should bring that to bear in deciding the Kastigar motion.
24 He has made that argument. Have I heard that correctly?

25 MR. LEVINE: Yes, your Honor.

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1 THE COURT: OK. So, know that your credibility has
2 been called into question.

3 MS. ANDERSON: We are acutely aware of it. Thank you,
4 your Honor.

5 THE COURT: All right. Trial team, bye.

6 MR. LEVINE: May I have two minutes to set up?

7 THE COURT: Take the two minutes.

8 (Recess)

9 DEPUTY COURT CLERK: Continued Kastigar hearing. The
10 parties have previously given their appearances.

11 THE COURT: The one thing I can promise you is that
12 when we actually do resume this for real at the end of February
13 I will be a lot more compos mentis than I was yesterday,
14 because I will have seen things; I will be familiar with
15 things; and I will be able to respond to things and to ask
16 intelligent questions. That's always helpful, always helpful
17 if the judge has the record sometime before eight hours before
18 the hearing.

19 OK. Mr. Levine, the floor is still yours.

20 MR. LEVINE: I think there was one clarification that
21 the government wanted to make.

22 MS. SHAW: Yes, your Honor. As we had indicated in
23 one of our letters concerning the review of the SFO trial
24 transcripts, and as Ms. Connolly's declaration states, she is
25 continuing to review them page by page, notwithstanding her

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1 extensive computer searches, which have revealed no mention.
2 So, that is ongoing, and we would expect -- or we would
3 anticipate filing a supplemental affidavit just to say I've
4 completed reading them page by page.

5 To that end, there may be additional poor souls
6 recruited to go assist reading page by page, so that there may
7 be additional very brief affidavits attesting as such.

8 Certainly, if your Honor was of the position that the
9 computer searches might even be more accurate than human eyes,
10 we would be happy to --

11 THE COURT: I don't think they are more accurate than
12 human eyes, but if you had asked me whether I would have
13 thought they were sufficient, I would have thought they were
14 sufficient.

15 MS. SHAW: I suppose I would ask if your Honor would
16 think that they would be sufficient, I could bring Ms. Connolly
17 home from the United Kingdom.

18 THE COURT: The government does what the government
19 does. It's entirely possible I have said too much about how
20 the government should prove its case.

21 MS. SHAW: In any event, I wanted to --

22 THE COURT: It's your call.

23 MS. SHAW: Thank you, your Honor.

24 THE COURT: OK.

25 MR. LEVINE: Good morning, your Honor. I hope this

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1 does please the court. I really don't have very much to say
2 today, and I would like to just make a couple housekeeping
3 points, and I do have one substantive point, and then I'd like
4 to talk about discovery, if that's acceptable to your Honor.

5 THE COURT: Fine.

6 MR. LEVINE: Thank you.

7 As I understand the state of play from yesterday, the
8 court has received in evidence all of the affidavits that have
9 been proffered so far by the government, and any objections go
10 to weight, not admissibility, and that's their case with
11 respect to Mr. Prange and potentially some poor person who is
12 reading transcripts in London.

13 I think the trial team has produced some of those
14 transcripts. In any case, that's their case, that's what we
15 have, that's all that's been received into evidence. I just
16 want that to be clear for the record so I know what their
17 presentation is.

18 THE COURT: That's what they said.

19 MR. LEVINE: OK, I just want it to be clear.

20 THE COURT: I mean the one clarification that I needed
21 I got, which was that Mr. Weeks was the one and only -- agent
22 Weeks, sorry about that -- the one and only grand jury witness
23 against Mr. Black. That's something I did not know until this
24 morning.

25 MR. LEVINE: Speaking of the grand jury minutes, your

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1 Honor, one of the issues that we have talked to the taint team
2 about, and I think come to an understanding about in part, is
3 that I think because the participants in the grand jury process
4 in addition to Mr. Weeks are all affiants or declarants, that I
5 would ask that the government -- and the government is not
6 disagreeing -- provide to the court the full minutes of the
7 grand jury presentation, not simply Mr. Weeks' testimony, as
8 there are statements that are being made by other affiants to
9 the grand jury, which I think at least we should have access to
10 frankly in this very unique circumstance. The taint team has
11 declined on that but has said that they would provide it to
12 your Honor.

13 It seems to me something that should be done, and I
14 think it's important information, and we would ask to have an
15 opportunity to see it. This is an indicted case. There is, as
16 we understand it, nothing further that's going on in this grand
17 jury. But you have statements of three of your declarants who
18 spoke directly to the grand jury, and I think I'm entitled to
19 their statements under 3500, and I also think it's relevant
20 information for the court to have even if you decide I
21 shouldn't have it.

22 MS. SHAW: Your Honor --

23 THE COURT: I thought I asked for the grand jury
24 minutes. I thought I had.

25 MS. SHAW: We had provided the testimony of agent

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1 Weeks, as Mr. Levine said. We're happy to provide the
2 colloquy.

3 THE COURT: I would like the grand jury minutes.

4 MS. SHAW: Very well, your Honor.

5 THE COURT: Thank you.

6 MR. LEVINE: And if I could --

7 THE COURT: And, Mr. Levine, after I read them -- I'm
8 going back to pretending I'm a state court judge again. That's
9 what I used to do for a living, I used to read grand jury
10 minutes all the time. They were much less interesting than
11 these, I'm sure, but I did read them in every single case. So,
12 I promise you that I will bear in mind your request, and I will
13 respond to it is after I have reviewed the grand jury minutes.

14 MR. LEVINE: Thank you very much, your Honor. I
15 appreciate it.

16 Additionally, your Honor, and in reviewing some
17 comments from yesterday, I wanted to see if we can also try to
18 cut down some of the testimony and lots of e-mails. I might
19 put them in bulk.

20 But yesterday you made very clear -- this is in a
21 variety of places but especially on page 78 of the
22 transcript -- that any suggestion that this court had not
23 already concluded that there were -- and I'm quoting now from
24 page 78, line 7 to 9, you said that there is a very vast
25 difference between being a joint prosecution team and, as you

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1 said, interacting on a daily, weekly and monthly basis.

2 THE COURT: Which I don't know if it was daily, weekly
3 or monthly, but there was never any question. I went back and
4 read my earliest decision yesterday afternoon -- that's one of
5 the things I did -- from last March. There has never been any
6 question that there has been interaction for years on what
7 appears to be a fairly regular basis between the people who
8 were looking into this in England and the people who were
9 looking into this in the United States. I don't think the
10 government has ever suggested otherwise.

11 MR. LEVINE: Well, putting to the side -- I'm not
12 going to get into what they have. And it would not be these
13 folks anyway; it would be the trial team. But I think in
14 discussing this with the taint team, we are agreeing that not
15 only that the court has made a finding, but there is a
16 stipulation that there were contacts between -- well, there
17 were contacts between the Department of Justice and other
18 regulators in the United States on I think a daily, weekly,
19 monthly basis, and folks from the --

20 THE COURT: We'll call it regular.

21 MR. LEVINE: Well, your Honor --

22 THE COURT: I strike daily, weekly, monthly, because I
23 have no evidence on which to base that. But let's say there
24 were regular -- that was the point I was trying to make.

25 And, by the way, my findings of fact will be in an

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1 opinion that will be at the end of this case, at the end of
2 this hearing, and not before.

3 MR. LEVINE: Your Honor, I'm trying to tell you we
4 stipulated to this.

5 THE COURT: Good, you're stipulating there was regular
6 contact.

7 MR. LEVINE: We will stipulate to what you said, so I
8 would ask you to unstrike it and allow us to have that, because
9 otherwise I have to prove it up.

10 THE COURT: You don't have to prove daily, weekly,
11 monthly. The stipulation I'll bet is that there were regular
12 contacts.

13 MR. LEVINE: No, it was actually to this line. This
14 is the line we discussed, there were weekly, daily, contacts.
15 It's important to me.

16 THE COURT: What do you want to stipulate to?

17 MS. SHAW: To regular contacts, your Honor. There was
18 not particular line of the hearing.

19 THE COURT: Look, I'm not a witness. I also, as you
20 know, when trying to induce people to talk to me tend to
21 hyperbole. I do a whole variety of things to try to get people
22 to talk to me, but that is not a finding of fact.

23 MR. LEVINE: No, I understand, your Honor.

24 THE COURT: It's not.

25 MR. LEVINE: I'm not trying to make it. What I'm

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1 trying to say to you is we can prove this up and put in --

2 THE COURT: Whether it was regular or daily doesn't
3 make a whole hill of beans worth of difference to me as the
4 trier of fact. It doesn't. The point is made, the government
5 stipulates they were in continual contact with the regulators
6 in Great Britain. OK, fine.

7 MR. LEVINE: Who had access to Mr. Black's compelled
8 testimony.

9 THE COURT: Correct, they were. All right. That
10 doesn't mean that they had access to Mr. Black's testimony, and
11 it doesn't mean that the regulators in Great Britain told them
12 about Mr. Black's testimony.

13 MR. LEVINE: That's true, your Honor.

14 THE COURT: Good, I'm glad we've gotten to that.

15 MR. LEVINE: Well, but that having been stipulated,
16 here is my problem: Your Honor has made it abundantly clear in
17 your opinion that with respect to Mr. Prange -- let's start
18 with him -- that every contact -- this is page 22, first full
19 paragraph, after talking about -- you said the government must
20 produce Prange for testimony under oath and identify questions
21 he asked during the King proffer. Prange will have to identify
22 under oath the source other than Black for anything that he
23 asked King during the proffer, and either he or someone else
24 will also have to testify about his contacts with the
25 prosecution team prior to the presentation of the case to the

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1 grand jury, so the court can rule out the possibility that he
2 inadvertently or not told the government something about
3 Mr. Black's compelled testimony which it was not already
4 independently aware. As the D.C. Circuit said, this sort of
5 inquiry tends to be intrusive, must go line by line, which in
6 this particular situation means going step by step through
7 Prange's contacts with the government, with the prosecution
8 team.

9 Well, your Honor, I agree that that is exactly what
10 has to happen to the extent they want to prevent the finding
11 that they've failed to meet their burden on taint for
12 Mr. Prange.

13 But I also think, your Honor, that whether or not they
14 can show that for Mr. Prange, they have not shown that in the
15 evidence which we believe is closed with respect to any of the
16 other folks that I have presented to you that had contact with.
17 And the government acknowledges -- and we can argue about daily
18 or regularly, it doesn't matter.

19 The evidence in this proceeding is now closed. Your
20 Honor gave another possible way the government could satisfy
21 you. That was on page 24, where you said: As the government
22 directly points out, any witness who testified before the grand
23 jury, who is expected to testify at trial, can overcome the
24 force of Black's hypothetical simply by testifying under oath
25 that she/he could not have been exposed to anything from

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1 Black's testimony because she/he, one, did not review any
2 charging document in the case, two, did not attend any trial of
3 any case by the SFO or otherwise reviewed testimony to those
4 proceedings, and, three -- and most importantly for my
5 argument -- did not discuss the testimony or anything derived
6 therefrom from any person who has been identified as having
7 been exposed to it. The Second Circuit's decision in United
8 States v. Nani, having made it clear that a witness can be
9 tainted even by talking to a person who is exposed to testimony
10 about the case. Unfortunately, I do not accede to the
11 government's request that we avoid the time and expense in
12 that.

13 Your very unequivocal and clear words, your Honor,
14 were a rule book, an instruction guide to the taint team for
15 this Kastigar hearing. You have been presented with no
16 affidavits that fulfill either of those standards. In fact
17 you --

18 THE COURT: It sounds like closing argument to me.

19 MR. LEVINE: Well, your Honor, I'm simply pointing out
20 to you that as of right now the evidence is closed.
21 Mr. Prange, if the government wants to satisfy their burden,
22 they have to bring him. But even before he gets here, your
23 Honor, it's my respectful submission that given that the
24 government has not even identified their trial witnesses in
25 these affidavits, given that none of the people from the

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1 government have provided you any testimony at all about who
2 they spoke to -- with the exception of two affidavits that just
3 said we told the FCA not to do anything -- and given that you
4 have no information from people even that talked to King -- the
5 affidavits of five of the six people who spoke to King have
6 been submitted to you; they don't mention Mr. King's proffer.
7 So the government has closed other than Prange, and they
8 haven't satisfied what we say the standard is. Therefore, I
9 don't see a reason right now --

10 THE COURT: I do, because this is a hearing; this is
11 not the trial; and I just might let the government reopen. OK?

12 So, I hear you. I am not prepared to be
13 hypertechnical about this. I think that the government needs
14 to take a look, because I thought through that opinion for a
15 very long time and very, very clearly.

16 And you may have been a little cavalier, but you can't
17 present your evidence after he presents his. That's not how it
18 works. And the fact that you want to listen to his and then
19 call your rebuttal doesn't make it rebuttal, and you need to
20 understand that.

21 I'm not intimately familiar with this record because I
22 got it the last second. I need to read these affidavits again,
23 but they don't say very much possibly because there is not very
24 much to say. And I don't want them to say things that are
25 extraneous. I did say something about trial witnesses in the

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1 opinion, and who they talked to, and who they didn't talk to,
2 and who they were exposed to, and ruling out that anybody that
3 they were exposed to who was tainted talks to them about things
4 that were in Mr. Black's testimony. I mean these are the kinds
5 of things that happened in Rabobank. They are the kinds of
6 screwy things that happened in Rabobank.

7 What else do you want to say, Mr. Levine?

8 MR. LEVINE: Well, on this point, your Honor, we do
9 not think -- with the exception of Mr. Prange and these folks
10 in London doing reviews -- we respectfully request that you do
11 not allow the government to offer any other evidence.

12 THE COURT: OK, I hear you. And if you are unlucky
13 enough to find yourself some day in the Second Circuit and I
14 have allowed the government to put in other evidence, you
15 should certainly assign it as error.

16 MR. LEVINE: Well, I hope that will not happen.

17 Your Honor, just two other points from yesterday that
18 I just want to make sure that I have been clear on, because I
19 think we may have talked past each other. My fault, I'm sure.

20 Your Honor, you said yesterday you of course were not
21 going to hold the FCA and the SFO responsible for U.S. rules.
22 And I wanted to make clear to your Honor that not only do I not
23 disagree, but I agree with you a hundred percent about that.

24 I raise it for the simple reason. The Allen
25 standard -- and I think in some of our discussions of UK law I

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1 think we may have lost track of this, or at least perhaps my
2 feeling is we were losing track of it, is a rule that to me its
3 the constitutional equivalent of standard parental advice,
4 which is, I don't care what anybody else is doing; you should
5 do the right thing.

6 Here Allen is the constitutional version of that which
7 says we don't care what everybody else in the world does. When
8 we bring a man to the United States and say to him he will
9 stand trial, he will follow our rules. Whether that compelled
10 testimony was taken in Brooklyn, Manhattan or Timbuktu, it
11 doesn't matter. And so I quite agree with you that we don't
12 care ultimately how the SFO and our friends in the United
13 Kingdom run their criminal justice system for these purposes.
14 We have to be satisfied that we have run our criminal justice
15 system in a way that's consistent with our most fundamental
16 rights, here our right against self-incrimination.

17 So, I had proffered to the court -- and I am happy to
18 provide the particular link -- about has the government
19 fulfilled its burden, it doesn't matter whether the evidence
20 was in London or it was here. The burden on the government is
21 the same, namely Mr. Black needs to be treated as if he was
22 compelled in a federal grand jury here in this courthouse, and
23 I think it's a very important point that we can't lose sight
24 of.

25 So, you know, again we have no evidence in this

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1 record, not one word about the standards, about the wall, about
2 the relationship between the taint team and the prosecution
3 team, and again, your Honor, that is a failure of proof.

4 THE COURT: I do not think that is a failure of proof;
5 I think that is your defense. I do not think that is a failure
6 of proof. I do not think whether at main Justice they follow
7 the precepts of the U.S. Attorney's manual and set up taint
8 teams from different divisions that work in different buildings
9 or on different floors is ultimately the question that is
10 raised in this case. It's just not the question that's raised
11 in this case.

12 The question raised in this case is has anybody who is
13 connected with this case -- a witness, a member of the trial
14 team, a grand jury witness -- been tainted by being exposed to
15 Mr. Black's testimony.

16 Your point, which I take, is that I should bear in
17 mind that the government may have been careless in how it
18 attempted to protect its trial team and those who interacted
19 with it from information that was tainted. You made that
20 argument; I don't think I need to hear it again. I know it's
21 out there.

22 MR. LEVINE: And my narrow argument is that the
23 government has closed -- it's not a question of whether it
24 happened right or wrong. That's not the issue. The issue is
25 have they proven it didn't.

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1 THE COURT: That's not what --

2 MR. LEVINE: They have to satisfy you that it didn't
3 happen, your Honor.

4 THE COURT: Fine. But guess what, it would be
5 rebuttal evidence, because they didn't have to prove the
6 details of the wall that they set up, or that they complied
7 with U.S. Attorney's manual or anything else.

8 If you wish to raise questions about that, then the
9 government can appropriately introduce rebuttal evidence. And
10 if you don't like that ruling, do except to it.

11 MR. LEVINE: Well, your Honor, can I ask if there is
12 no wall and the taint team has the transcript, and they have
13 not proven that there has been no taint with the rest of the
14 Department of Justice, and that's the record before you --

15 THE COURT: That's not the record before me. Members
16 of the trial team have declared on oath to this court as
17 witnesses and as officers of the court that they haven't seen
18 the transcript, that they haven't talked to anybody about the
19 transcript and that no one has talked to them about the
20 transcript. That's the state of the record.

21 You have raised questions about whether that could
22 possibly be believed, given that you find the wall to be a
23 porous one. I hear your argument. It is something I will take
24 into account in assessing the credibility of the government's
25 witnesses. But the government's burden in a Kastigar hearing

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1 is not to prove that the wall that it set up met any particular
2 criteria. The government's burden is to prove that the
3 relevant people were not exposed to the defendant's compelled
4 testimony. That is the government's burden.

5 MR. LEVINE: Can we take up discovery now, your Honor?

6 THE COURT: Sure.

7 MR. LEVINE: So we ask with respect to all of the
8 government's witnesses --

9 THE COURT: I can't hear you.

10 MR. LEVINE: I'm sorry, your Honor. I don't want to
11 repeat what I said yesterday. I thought we had an
12 understanding with the taint team. There's a letter they sent
13 to me said we're abiding by our Jencks, Brady and Giglio
14 obligations, that they were going to produce it all. There
15 were disagreements on two points, which is what they have to
16 give me I think from the people at the Department of Justice
17 and what they can redact. I think they have to give me all of
18 it for all of their affiants, and I also think they have to not
19 redact things that they deem irrelevant.

20 And I understand the standard they're using for
21 irrelevance is whether or not they think it relates solely to
22 the Deutsche Bank LIBOR case as opposed to all of the other
23 LIBOR cases. And on that point -- and I have argued this
24 before -- however, your Honor, today, if you would like, I am
25 happy to prove up to you why that distinction that has been

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1 made -- and I have had to argue for so long about it -- is one
2 that I don't think that the government's prosecution team here
3 can any longer advance based on the grand jury testimony.

4 But if they want to concede it and just give us the
5 material -- and I will tell you why. Because the question is
6 taint and the question is what their witnesses were talking
7 about. And, as I pointed out to them, if Mr. Whoever is
8 talking to somebody on the trial team, and they're having a
9 conversation about a wide variety of issues, especially since
10 this investigation -- because we know we have our Antitrust
11 folks here -- two of these folks are from the Antitrust
12 Division -- they are looking at horizontal practices.

13 You know this argument, your Honor. There is just no
14 way they should be redacting things because they think it
15 doesn't relate to Deutsche Bank LIBOR. They shouldn't be doing
16 it in the main case, and they shouldn't be doing it here. And
17 it's not what they told the grand jury about this
18 investigation. And I'm happy to prove that up right now very
19 quickly.

20 THE COURT: Fine, fine.

21 MR. LEVINE: It is grand jury testimony that I'm going
22 to put up on the screen. I mean it is Mr. Weeks, and it is
23 testimony that has been given to us in discovery and we're
24 allowed to use it.

25 THE COURT: That's not the issue. The issue is

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1 whether there is anybody in the courtroom who should not be
2 exposed to it like members of the press?

3 Thank you, ma'am. Who else? I will have to ask you
4 to leave. I'm sorry. We will bring you right back in as soon
5 as possible.

6 Anybody else who is not on one of the defense teams?

7 (Pages 31 through 42 sealed)

8 (Continued on next page)

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1 THE COURT: Welcome back.

2 MR. LEVINE: Your Honor, I really don't want to do
3 anymore today. The only other thing I can address is next time
4 you have said that you're concerned about the extent of UK law
5 and what it bars and what it doesn't bar.

6 THE COURT: No, I have no interest in UK law. That's
7 not true. I'm not concerned about it, and I have no interest
8 in it. I accept that it's different than ours.

9 I have to say that the fact that it's different than
10 hours bears on whether I think regulators in statements to me
11 are careless or lying bastards. I mean they operate under
12 different rules than we do. And as familiar as our lawyers try
13 to make them with our rules, I have been -- I spent a
14 fascinating day last year on a panel, among other panels, with
15 a group of American judges and UK judges, talking about
16 terrorism cases, and the differences are extraordinary, and we
17 look at each other dumbfounded. They don't understand us; we
18 don't understand them; and it works in our respective spheres
19 of influence.

20 I don't want to become an expert in UK law. I think
21 you started this out correctly: The issue here is whether our
22 government has managed to abide by our law, even though that
23 includes dealing with some people who are not themselves
24 subject to our law, but who as a courtesy have been asked to
25 take particular caution.

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1 MR. LEVINE: I won't trouble your Honor with any more
2 of that today. I would like to reserve all the rest of our
3 examination of Mr. Prange. I also think that in light of the
4 fact that we do think there is more discovery to get, we have
5 asked, given that Mr. Prange is coming here voluntarily, that
6 to the extent that he has materials, since he is coming to
7 court, that are relevant or he is going to rely on, we feel
8 those should be produced; or anybody else who they are going to
9 rely, or any witness who is bearing witness here, we think we
10 should get that.

11 On that score, there is one other issue.

12 THE COURT: When are we going to deal with -- the
13 press is back in the room. Are we going to deal with paragraph
14 9 at the renewed Kastigar hearing?

15 MR. LEVINE: Your Honor, I think that obviously the
16 government will put in the rest of their case, and we may
17 certainly may address that with Mr. Prange or anybody else who
18 is here, or we may put something on about that in our case.

19 THE COURT: OK.

20 MR. LEVINE: The last thing is one issue -- regardless
21 of how the court resolves the current discovery issues -- it is
22 very clear that we have had yesterday references to the
23 refreshing of witnesses' recollections with documents. Mr.
24 Curtler, for example --

25 THE COURT: Well, he didn't say how his recollection

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1 was refreshed; he just said that it was refreshed.

2 MR. LEVINE: Absolutely right. There are others where
3 it's clear they have been refreshed or they looked at materials
4 in preparing affidavits.

5 In fairness, for us not to have live witnesses and
6 have people have looked at materials, I think in fairness we
7 should get that material, because it goes directly to the
8 statement they've made -- that the statement was prepared with
9 documents. That I think is basic fairness regardless of the
10 other issues.

11 MS. SHAW: Your Honor, we can address that in our
12 brief. We don't believe that there is a scenario that he
13 hasn't gotten materials. We have provided voluminous materials
14 that agent Weeks relied on, and then I believe some of the
15 documents that --

16 THE COURT: Well, I think your point was that the
17 Weeks exhibits is that these are alternative sources, that even
18 if he were tainted, he had an alternative source for everything
19 that he said to the grand jury line by line.

20 MS. SHAW: Correct. And I can't stand here today and
21 say that he didn't review those when he was preparing his
22 declaration, so to the extent that it refreshed his
23 recollection about where he got something --

24 THE COURT: I look forward to receiving your brief.

25 MS. SHAW: Thank you, your Honor.

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1 THE COURT: Now, we're not going to change the dates
2 again, right? Right.

3 MR. BREEN: Yes, your Honor.

4 THE COURT: Promise?

5 MR. BREEN: Yes.

6 MR. LEVINE: We don't have a final date for the
7 Kastigar. We have to hear from Mr. Prange about whether he can
8 come in February.

9 THE COURT: Well, he is going to come in February.

10 MS. SHAW: We will let the court know as soon as
11 possible about Mr. Prange's availability.

12 THE COURT: Please, ASAP. I will interrupt in January
13 if I have to but I'd rather not.

14 MS. SHAW: Understood.

15 THE COURT: OK. Happy holidays to all.

16 (The following exhibits were relied on and reviewed by
17 the defense: Defendant's Exhibits 190, 191, 192, 193, 201,
18 202, 99, 51, 54, 90, 82, 63, 38, 192, 107, 207, 208, 75, 97,
19 58, 132, and Government Exhibit 4A).

20 (Adjourned)